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1 San Diego, California, Friday, February 21, 2014

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3 THE COURT: All right. Good morning, ladies
4 and gentlemen.

5 We'll take up the case of the City of San Diego
6 versus San Diego City Employees Retirement System and the
7 related intervenors.

8 Counsel, could you please give your appearances
9 for the record.

10 MR. GOLDSMITH: Jan Goldsmith for the City of
11 San Diego.

12 THE COURT: Good morning.

13 MR. WORLEY: Donald Worley, the City of
14 San Diego.

15 THE COURT: Good morning.

16 MR. CHUNG: Walter Chung on behalf of the City.

17 THE COURT: Good morning.

18 MR. PHELPS: Deputy City Attorney Travis Phelps
19 on behalf of the City.

20 THE COURT: Thank you, sir. Good morning.

21 MS. SMITH: Good morning, Your Honor.
22 Ann Smith on behalf of the San Diego Municipal Employees
23 Association.

24 THE COURT: Good morning.

25 MS. GREENSTONE: Good morning, Your Honor.
26 Ellen Greenstone on behalf of AFSCME Local 127,
27 Intervenor.

28 THE COURT: Good morning.

1 MR. CONGER: Michael Conger on behalf of the
2 San Diego Police Officers Association.

3 THE COURT: All right. Thank you.

4 MR. KLEVENS: Good morning, Your Honor.
5 Joel Klevens for Intervenor San Diego City Firefighters.

6 THE COURT: I knew there was others.

7 MR. MCGRATH: And Chris McGrath for Respondent
8 San Diego City Employees Retirement System, Your Honor.

9 THE COURT: Okay. Thank you.

10 Have a seat, counsel.

11 Have you all received the tentative decision?

12 (Affirmative response from all counsel in
13 unison.)

14 THE COURT: All right. This is the City's
15 motion. Who wants to argue it for the City?

16 MR. GOLDSMITH: Thank you, Your Honor.
17 Jan Goldsmith for the City of San Diego.

18 I am not going to argue the merits of the
19 motion because we will submit on the tentative and ask
20 that it be confirmed as the ruling of the Court.

21 There is one comment that I would like to make
22 for the future record, given the City of San Diego's
23 history, what I am concerned about and why I asked for
24 this hearing. The City of San Diego has a history of
25 agreements that later on when circumstances change are
26 challenged and allegations are made and there's
27 conspiracy buffs in the City.

28 THE COURT: Yeah.

1 MR. GOLDSMITH: It's a history. I don't want
2 that to --

3 THE COURT: I get the *San Diego Union* at home
4 and I disclosed that I have read the newspaper just like
5 any local judge would.

6 MR. GOLDSMITH: I understand.

7 And there will be a day, Your Honor, when the
8 stock market goes down; I don't know what percentage, but
9 at some point the stock market will go down and the
10 City's contribution will go up and somebody will look at
11 the City Charter and say, "Wait a second. Why did the
12 City do this?"

13 I want there to be a clear public record as to
14 the legitimate policy reason. We have a court reporter
15 here. We will ask for a transcript. We will preserve it
16 in the historical record of the City. Your tentative,
17 our papers, these declarations are all geared to preserve
18 the integrity of this agreement. It is in good faith.
19 It is good policy made by the City Council in good faith.

20 The reason doesn't have to do with the stock
21 market, it has to do with preserving our employees and
22 keeping and retaining them. And at this point in time --
23 at this point in time in the City's history it is a huge
24 problem, particularly with the Police Department, as your
25 tentative pointed out, and so the City Council made a
26 policy decision and they made it for good reasons at this
27 time. And it is also a good thing. There are times when
28 the stock market goes up and there are times when the

1 stock market goes down.

2 THE COURT: I have a 401k; I'm aware of that.

3 MR. GOLDSMITH: So do I.

4 And the City Council recognizes the risk of
5 when it goes down and goes high. The City can absorb
6 that. And we'll take that risk and we'll take the
7 benefits when it goes up better than individual employees
8 who would be scared of that risk and more apt to leave
9 the City. The record supports that. Your tentative is
10 correct. I just want the record for a decade later if
11 and when that happens there is an explanation and it's
12 all out in the public.

13 Thank you, Your Honor.

14 THE COURT: Thank you, Mr. Goldsmith.

15 As set forth in the memorandum attached to my
16 tentative which says -- tentatively grants the motion, I
17 have no relation to Assistant Chief Shelley Zimmerman.
18 We could be the only two people in an elevator car and we
19 wouldn't know we were each named Zimmerman. And I don't
20 mean to be offensive, I don't know if it is Shelley as in
21 -- and I'm dating myself here -- as in Shelley Winters or
22 as in it Shelley Berman, I don't know if it's a man or a
23 woman. I'm not familiar with that person at all. But
24 that declaration was rather persuasive to me.

25 MR. GOLDSMITH: Thank you, Your Honor.

26 And that information was persuasive to the City
27 Council.

28 THE COURT: All right. Thank you.

1 Yes, sir.

2 MR. MCGRATH: Your Honor, Chris McGrath again
3 for respondent SDCERS.

4 I think every party in the room is in accord
5 with the ultimate relief sought by this motion, so we all
6 seek it and we all appreciate the ultimate result of this
7 is a good faith determination that we need to finalize
8 the settlement.

9 The only minor factual modification that I
10 would request, your tentative refers to the summary
11 judgment motion reference in the first paragraph. In
12 fact, the summary judgment motion the City brought was
13 not eventually heard, it was withdrawn prior to hearing.

14 THE COURT: Oh, okay. Then that will stand
15 corrected.

16 MR. MCGRATH: But with that modification we are
17 obviously on board with seeking a good faith
18 determination.

19 THE COURT: If I had the history down
20 incorrectly, then I will --

21 Does anybody disagree with that?

22 MR. GOLDSMITH: No. That's a good catch.
23 Thank you. We agree. Thank you, Your Honor.

24 THE COURT: I thank you, sir. I'll correct the
25 memo on the tentative to the extent that you have
26 indicated.

27 MR. MCGRATH: Thank you, Your Honor.

28 THE COURT: You're welcome.

1 MS. SMITH: Your Honor, Ann Smith.

2 THE COURT: Yes.

3 MS. SMITH: In that regard, in that first
4 paragraph I think what Your Honor was likely thinking is
5 that Your Honor did hear and deny the City's motion for
6 judgment on the pleadings.

7 THE COURT: Yeah, it was judgment on the
8 pleadings, not summary judgment, that's true.

9 MS. SMITH: That's right. And then the City's
10 summary judgment motion was pending but withdrawn before
11 hearing, so if you want to correct that history, that
12 would be the reference.

13 THE COURT: You have refreshed my recollection,
14 and I agree.

15 MS. SMITH: Thank you.

16 THE COURT: Now I understand that this is being
17 agreed to by the defendants and the intervenors but that
18 they are without any admission that Proposition B is
19 valid. The Court has to assume that Proposition B is
20 valid. I understand your reasons for not wanting to
21 agree to that, but I think the City Attorney's analogy is
22 that that's like China not recognizing that Taiwan
23 exists, it doesn't mean that Taiwan doesn't exist.

24 So I don't have any problem with the fact that
25 you're, for whatever purposes -- and I know what purpose
26 it is, really, I'm not oblivious to it, that you don't
27 want to recognize the validity of that proposition, but
28 still.

1 And before I make the final ruling, does
2 anybody have anything else to add.

3 MS. SMITH: Your Honor, I would just add this
4 one comment which is that we have agreed to proceed as
5 the City has requested --

6 THE COURT: Yes.

7 MS. SMITH: -- in recognition that so long as
8 Proposition B remains in the City's Charter, that this is
9 the proper procedure to follow and that's why we're
10 before you. So we have all agreed that we will comply
11 with this procedure, but in so doing and because we do
12 have a pending case on which at the first level the
13 administrative law judge has agreed with us that
14 Proposition B is not lawful, that we, obviously --

15 THE COURT: Well, I wasn't aware of that, but
16 that's a different matter, that's not before me.

17 MS. SMITH: Right, exactly. In other words,
18 this is not just an idle observation that we are making
19 to be difficult. So we are putting aside the fact that
20 we have pending litigation on the lawfulness of
21 Proposition B and we are simply agreeing that in order to
22 come to a conclusion here --

23 THE COURT: So you don't want to make any
24 admissions that might be used against you in other
25 pending litigation.

26 MS. SMITH: Exactly right. Exactly right. But
27 we are all in agreement that we are proceeding in this
28 manner and we are submitting to you the request that you

1 make this good faith determination.

2 THE COURT: All right.

3 MS. SMITH: And, as you know, there was no
4 opposition to you doing so.

5 THE COURT: No, I noted that nobody has raised
6 any issue of any bad faith here. And I'm of the view
7 that if there's no bad faith, then that must equal good
8 faith because I don't know what can be in the middle.

9 MS. SMITH: That's right.

10 THE COURT: So I'm inclined to go along with
11 the tentative and make that ruling unless anybody has
12 anything else to say. I want to make sure we have a
13 perfect record here because this is an important case and
14 I recognize that.

15 Officially, then, the Petitioner City of
16 San Diego's motion for good faith settlement pursuant to
17 Proposition B as opposed to the good faith settlement I'm
18 used to under Code of Civil Procedure is granted.

19 Now is there -- does somebody have on order?

20 I would like the order circulated and signed by
21 all parties.

22 MS. SMITH: Your Honor, the order that we
23 prepared and submitted to you with our papers is a simple
24 statement of your good faith determination.

25 I did revise it to strike out the word
26 "proposed" and to allow for a signature on today's date.
27 I did bring that with me, if that would be convenient.
28 It is the same --

1 THE COURT: Yeah, we'll strike the word
2 "proposed," if that's on there.

3 MR. GOLDSMITH: Your Honor, I don't have a
4 problem with an order on the motion. I'd like to prepare
5 the judgment. The Settlement Agreement has specific
6 wording on what the judgment should state.

7 THE COURT: All right.

8 MR. GOLDSMITH: It should incorporate the terms
9 of the Settlement Agreement.

10 THE COURT: Okay.

11 MR. GOLDSMITH: So I would like to prepare the
12 judgment and circulate it.

13 The order could simply be -- an oral order
14 would be acceptable to us from the bench that, as you
15 have stated, is acceptable to us. We would waive a
16 written order and just accept your oral bench order. If
17 that's acceptable to all counsel, I don't have a problem
18 with that, or simply an order granting the motion.

19 THE COURT: I'm an old dog and it's hard for me
20 to learn new tricks. I'm used to signing an order
21 afterwards. But is there any way that I can do that
22 without driving 120 miles?

23 MS. SMITH: Your Honor, I do have the order
24 ready for your signature. And I made extra copies so
25 that there could be a conforming and we would then be
26 able to distribute that amongst ourselves.

27 MR. GOLDSMITH: We don't have a problem with
28 the proposed order, Your Honor. I would like to prepare

1 the judgment and circulate it.

2 Can we send it to you or send it to the court
3 and make sure that you don't have to do the 120-mile
4 trip --

5 THE COURT: Well, sometimes I come over here
6 for other reasons. I'll do it as quick as I can, but I
7 think the court will prepare the order.

8 MR. GOLDSMITH: Oh, okay. Thank you.

9 THE COURT: But as far as the judgment, I'll
10 leave that up to you.

11 MR. GOLDSMITH: If it's okay, I will prepare
12 the judgment and circulate it among counsel. Thank you.

13 THE COURT: Okay.

14 I want to thank you, counsel. I think I
15 mentioned this at the very beginning and, that is, when I
16 agreed to accept this assignment, I didn't think that I
17 would be here more than ten minutes.

18 The first thing I said was, "Are there any
19 motions?" And I thought there'll be a 170.6, and there
20 wasn't. But you have all been very courteous and very
21 professional and I really appreciate that and I want to
22 compliment you all for that.

23 MR. KLEVENS: Your Honor, may I inquire when we
24 can expect the City will circulate this proposed judgment
25 to counsel?

26 THE COURT: Yeah, it should be circulated. I
27 want everybody to sign off on it before I sign off on it.

28 MR. GOLDSMITH: We can get it to you within a

1 week.

2 MS. SMITH: Your Honor, may I inquire?

3 The Settlement Agreement, which was of course
4 fully executed and approved by all of the parties,
5 requires that within five days of the Court's approval of
6 this agreement as a good faith settlement, the City's
7 petition shall be dismissed with prejudice, so may I
8 inquire if that is going to occur based on your approval
9 today of the settlement?

10 THE COURT: Let me ask the City what their
11 position is on that because it's fine with me, but there
12 may be some technical reason the City Attorney's Office
13 doesn't want to go along with that.

14 MS. SMITH: They did sign off on it already,
15 Your Honor, it has been approved, that is what you are
16 approving today --

17 THE COURT: Yes.

18 MS. SMITH -- so I just want to make sure it's
19 in force as written.

20 THE COURT: Well, I'm not reversing myself, so
21 it's in force, yes.

22 MS. SMITH: Right. Okay.

23 MR. GOLDSMITH: There is also a provision in
24 the Agreement having to do with the judgment. I'm
25 happy -- we'll comply with the Settlement Agreement and
26 try to get the proposed judgment out.

27 THE COURT: Okay.

28 MR. GOLDSMITH: Today is Friday. We'll see if

1 we can get it out by the end of the day so we can comply.

2 THE COURT: All right. And if it can be
3 somehow Express mailed or FedEx'd to me that will be
4 wonderful. And I will do the same thing, I will send it
5 back like a boomerang; it will be back so fast you won't
6 know it.

7 MR. GOLDSMITH: We'll also meet and confer with
8 counsel on how best to do it. Our goal is to get the
9 case dismissed with prejudice and get the judgment
10 complying with the Settlement Agreement.

11 THE COURT: All right.

12 MR. GOLDSMITH: So we'll see what we can do.

13 THE COURT: You mentioned somewhere in these
14 pleadings that everybody understands, and you are all
15 seasoned attorneys and you are all good attorneys, that
16 litigation is inherently uncertain, but the only thing
17 certain about litigation is it's expensive and no matter
18 what ruling the trial court made it's going to be
19 appealed and that's going to take several years and
20 enormous expense and I think you all saved a lot of money
21 by settling this case where you each got something and it
22 makes sense and I think you have been reasonable.
23 Anyway, thank you.

24 MS. SMITH: And, Your Honor, the only remaining
25 business then I think before you, apart from what we will
26 be doing in preparing, reviewing, and submitting a
27 judgment and this dismissal will be entered, then we need
28 to get a date from you, as you know, in May for the

1 hearing on the attorneys' fee motions which are also
2 called out in our Settlement Agreement, and we were going
3 to propose --

4 THE COURT: I can't breath easy yet.

5 MS. SMITH: We were going to propose to
6 Your Honor, if a Friday is still your preference, that
7 perhaps May 23rd or even May 30th, if that works for you.

8 THE COURT: I'm going on a vacation, a rather
9 lengthy vacation in May.

10 MS. SMITH: I see. Okay. So is June better
11 then or --

12 THE COURT: It would be.

13 MS. SMITH: All right.

14 THE COURT: Early June, I suppose, would be
15 fine. Fridays or Mondays are really my preference, but
16 that's just because it's more convenient, there's no real
17 reason other than just my own personal convenience.

18 MS. SMITH: And that's fine, Your Honor. We
19 can all manage on a Friday or Monday. We often, of
20 course, have motion hearings in the court on Friday
21 anyway, so that's fine, whatever your preference is.

22 MR. GOLDSMITH: Your Honor, if I could be heard
23 on that?

24 THE COURT: Yes.

25 MR. GOLDSMITH: If we could just schedule that
26 the way we normally do in due course. I don't have a
27 calendar here and we haven't received any motion papers
28 yet.

1 THE COURT: No.

2 MR. GOLDSMITH: I would like to go back to the
3 judgment and dismissal so the Court and everyone knows
4 what I was talking about.

5 THE COURT: All right.

6 MR. GOLDSMITH: Paragraph 15 of the Agreement
7 says, "The parties agree that this Agreement is
8 contingent upon the Court's entry of a good faith
9 settlement determination and a judgment incorporating the
10 terms and approving the agreement."

11 The next sentence says, "If this agreement is"
12 -- I'm sorry. It says, in 17, "Within five days of
13 the Court's approval of this Agreement as a good faith
14 settlement the City's petition shall be dismissed with
15 prejudice." So we have a judgment and we have a
16 dismissal and we have got to work that out; there is a
17 little inconsistency there is what I'm saying. It
18 envisions a judgment incorporating the terms of the
19 Settlement Agreement, but also a dismissal, so I think we
20 have to work that out.

21 As for the date of the hearing, can we defer
22 that?

23 THE COURT: Yes, I agree.

24 MS. SMITH: Your Honor, may I? I'm sorry.

25 THE COURT: Please.

26 MS. SMITH: May I just say that we had
27 conferred by email about setting the date in May for the
28 attorneys' fee motions and agreed that we would ask you

1 to set that date. As Your Honor probably knows,
2 Ms. Sablan, the clerk in Presiding, had to endure three
3 weeks of multiple email exchanges just to get this
4 hearing set before you today, and I don't think we should
5 put the Court's staff through that again, so if we could
6 set the date. There is plenty of time.

7 We contemplated by email exchanges with
8 Mr. Worley that we would have a date and then we would do
9 the filings by code in relation to the hearing date, so
10 I'd like to go out of here today with that hearing date.

11 THE COURT: Legally when is judgment actually
12 entered: When I make my pronouncement or when I sign the
13 document that says that's it? I think it's when I sign.

14 MR. CONGER: Your Honor, Mike Conger.

15 Technically, and I have been through this
16 before many times, there can only be one judgment. And
17 you remember from reading appellate cases there is the
18 "one final judgment rule." The final judgment in this
19 case will be the judgment of dismissal with prejudice.

20 Paragraph 15 is technically inaccurate. That
21 should just be an order approving this settlement
22 as opposed to a judgment. But there can only be one
23 judgment. And so if you want to reconcile them, perhaps
24 there should be a judgment saying: I approve the
25 settlement in good faith. As set forth in my tentative,
26 I approve of the Settlement Agreement and the case is
27 hereby dismissed with prejudice and then it incorporates
28 both.

1 MR. GOLDSMITH: Your Honor, I would like to be
2 heard on that.

3 THE COURT: Okay.

4 MR. GOLDSMITH: If you are going to do away
5 with a term in a settlement we need to talk and meet and
6 confer on that and that might require a motion. But an
7 important term of this Settlement Agreement was that
8 there would be a judgment incorporating the terms and
9 conditions of the Settlement Agreement so it's all of
10 record, the Settlement Agreement would be attached, and
11 that is the terms and conditions of the judgment, the
12 case is dismissed, we all go away and that's of record.

13 THE COURT: Yeah.

14 MR. GOLDSMITH: But why don't we give a chance
15 for the lawyers to deal with this and see if we can work
16 it out.

17 THE COURT: I think I'm going to error on the
18 side of caution here and go along with the City
19 Attorneys' position on this. I don't want to act in
20 haste and then regret it later. So I'll wait until we
21 have a written judgment and then within five days of that
22 there has to be a dismissal pursuant to the Agreement
23 with prejudice.

24 MR. GOLDSMITH: Okay. Thank you, Your Honor.

25 MS. SMITH: And that's fine, Your Honor. And I
26 would just request again that before all of these lawyers
27 leave, that we simply get a date for the hearing on the
28 attorneys' fee motion that is compatible with your

1 calendar so we do not have to go through and put your
2 staff through what we did put the staff through to get
3 this hearing today.

4 THE COURT: Just out of curiosity, does
5 Proposition B provide for attorneys' fees on litigation
6 or is this one of these benefits to the public?

7 MS. SMITH: It's a 1021.5 motion, Your Honor,
8 or basis. This case doesn't arise under Proposition B in
9 any event, that was never even put before you.

10 THE COURT: Well, okay. All right.

11 MS. SMITH: Yes. It is only because of this
12 settlement feature under Prop B that we are doing this
13 good faith process.

14 THE COURT: Well, I would tentatively like to
15 set Friday, June 6th, if that's acceptable to everybody,
16 if nobody is going to be in Bora Bora that day.

17 MR. GOLDSMITH: Your Honor, I'm not prepared
18 with a calendar.

19 THE COURT: Well, we can change it. We changed
20 the date on this hearing several times. I'm fluid on
21 that.

22 MR. KLEVENS: Could I just suggest, as
23 Your Honor stated, have June 6th as the tentative date?
24 If the City Attorney comes forward and says that for some
25 reason he's unable to make that date, then we'll have to
26 deal with an alternative, but at least we'll have that
27 date on calendar tentatively subject to the City Attorney
28 having --

1 THE COURT: And the next date is Friday, the
2 13th, so --

3 MS. SMITH: And on Friday, June 6th,
4 Your Honor, what is your preference for a time for the
5 hearing?

6 THE COURT: I like the 10:00 a.m. time --

7 MS. SMITH: All right.

8 THE COURT: -- if that's good with everybody.
9 It gives me more time, gives you more time.

10 I don't suppose there is any hope here, but can
11 you talk about this and see if there is any way that you
12 can resolve this informally before June 6th?

13 MR. GOLDSMITH: There is no basis for either
14 side recovering attorneys' fees, this is a settlement;
15 but if they want to try and roll the dice, so be it.
16 It's a settlement.

17 THE COURT: Yeah, there you go.

18 MR. GOLDSMITH: That's what it's about.

19 THE COURT: I tentatively believe that you each
20 got something out of the settlement, which is a good
21 thing.

22 Okay, June 6th at 10:00 a.m., the department to
23 be assigned.

24 MR. GOLDSMITH: Okay.

25 THE COURT: I appreciate your help, counsel.
26 Thank you.

27 MR. CHUNG: Your Honor, just as administrative,
28 to get you the proposed judgment when all of the counsel

1 have signed off, previously you provided counsel your
2 email address. In lieu of overnight, would you like us
3 to email it to you?

4 THE COURT: Yeah, I guess I can print it out
5 and sign it because you're going to have to have an
6 actual what they call, I guess, "wet signature" on the
7 document. And then I'll get it in the overnight mail or
8 Federal Express or something back to the Court.

9 Does that satisfy you, Mr. Chung?

10 MR. CHUNG: That is just to help you out. And
11 if for some reason the email copy doesn't work, obviously
12 one of the parties will overnight it to you.

13 THE COURT: If it comes down to it -- you see,
14 I didn't have any problems before, I lived here, I had a
15 house in San Diego, but I sold it last month and now I
16 don't have a base of operations here that I can live in
17 my own house. And I hate living out of a hotel room; I
18 don't suppose anybody likes that. So I'll come over here
19 if I have to, but if I can avoid it, I would like to
20 avoid it. And it costs the State less money if we can
21 avoid it.

22 You know, I have noticed good attorneys either
23 make a judge's life hell or they make it easy, and you
24 have done everything that you can to make it easy rather
25 than make it hell. Thank you.

26 MR. GOLDSMITH: Let's see if we can handle the
27 judgment without that.

28 MR. CHUNG: Thank you, Your Honor.

1 MR. MCGRATH: Thank you, Your Honor.

2 MS. SMITH: Thank you, Your Honor.

3 THE CLERK: Your Honor, notice waived on the
4 hearing?

5 THE COURT: Oh, yeah, the clerk has a good
6 idea. Is notice waived as far as written notice of the
7 June 6th?

8 MR. CHUNG: The City waives notice.

9 (Affirmative response from all counsel in
10 unison.)

11 MR. KLEVENS: We would just request --

12 THE COURT: Is there anyone who is not waiving
13 notice?

14 (No response.)

15 MR. KLEVENS: -- that if the City Attorney
16 wants to change that date, if he would let us know as
17 soon as he gets back to his office.

18 THE COURT: Yeah.

19 MS. SMITH: Thank you, Your Honor.

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21 (PROCEEDINGS ADJOURNED)

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CERTIFICATE

State of California)
County of San Diego)

I, Lois Mason Thompson, CSR No. 3685, a reporter in the Superior Court of the State of California, in and for the County of San Diego, hereby certify that I reported in machine shorthand the proceedings had in the above-entitled cause, and that the foregoing transcript is a full, true, and correct transcript of the said proceedings.

Dated at San Diego, California, February 23, 2014.

Lois Mason Thompson
CSR No. 3685

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